

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re:

MDL Docket No. 1376

ZONOLITE ATTIC INSULATION  
PRODUCTS LIABILITY LITIGATION

PAUL PRICE, JOHN PREBIL and  
MARGERY PREBIL, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

W.R. GRACE & COMPANY (a Delaware  
corporation); W.R. GRACE & COMPANY-  
CONN. (a Connecticut Corporation); W.R.  
GRACE & CO., a/k/a GRACE, an association  
of business entities; SEALED AIR  
CORPORATION (a Delaware corporation),

Defendants.

Civil Action No. CV 0071-M-DWM

(Transferred from the District of Montana,  
Missoula Division)

**DECLARATION OF ATTORNEY RICHARD S. LEWIS**

City of Washington )  
District of Columbia ) ss.

RICHARD S. LEWIS states:

1. I am an attorney for the plaintiffs in the above-captioned matter. I have personal knowledge of the facts contained in this Affidavit, and am otherwise competent to testify to those facts.

2. The documents designated with "Common Exhibit" numbers are common exhibits used in the personal injury actions against W.R. Grace in scores of cases in the Nineteenth Judicial District Court for the State of Montana (Lincoln County). For each of the following exhibits designated with "Common Exhibit" numbers, W.R. Grace has acknowledged a) authenticity, and b) that they are business records of W.R. Grace & Co.

3. The documents listed not designated with "Common Exhibit" numbers are true and correct copies of the documents described.

Exhibit 1 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co., Case No. 00201756-6), Order Granting Plaintiff's Motion for Class Certification Pursuant to CR23(b)(2), (December 19, 2000).

Exhibit 2 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co., Case No. 00201756-6), Memorandum Decision Motion #1 (November 28, 2000).

Exhibit 3 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co., Case No. 00201756-6), Memorandum Opinion Motion No. 2 (December 19, 2000).

Exhibit 4 is purposely left blank at this time. Plaintiffs have not yet received a signed copy of the Order Denying Plaintiffs' Motion for Preliminary Injunction and Emergency Notice to Class Members.

Exhibit 5 is a true and correct copy from *Barbanti v. W.R. Grace, et al.*, (Spokane Co., Case No. 00201756-6), Proposed Rule 23 (d)(2) Notice.

AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

1 Exhibit 6 (Common Exhibit 183.40) is a true and correct copy of a 1978 (dated  
2 April 3, 1975(sic)) performance report of W.R. Grace's U.S. Zonolite operations documenting  
3 the tonnage of milling capacity at the Libby operation.

4 Exhibit 7 is a true and correct copy of a memo to Bettacchi from Ciampa re Monthly  
5 Report of insulation sales (Sept. 83).

6 Exhibit 8 (Common Exhibit 16) is a September 12, 1956 report from Benjamin Wake,  
7 acting industrial hygiene engineer for the Montana Department of Environmental Quality, to  
8 Dohrman H. Byers, Assistant Chief, Toxicological Section of United States Public Health  
9 Service, documenting the asbestos content in the zonolite ore in its relationship to asbestos in the  
10 dust in the air pertaining to vermiculite mined at Libby, Montana.

11 Exhibit 9 is a true and correct copy of memo dated 4/19/77 to Wood from Yang regarding  
12 tremolite content of Zonolite products.

13 Exhibit 10 (Common Exhibit 183.12) is a true and correct copy of a memo dated May 24,  
14 1977 from E.S. "Chip" Wood, Executive Vice President of Zonolite Operations, to Charles N.  
15 Graf, Vice President of W.R. Grace & Co. for the Industrial Chemicals Division, with copies to  
16 other high-level Grace executives including Rodney M. Vining, President of the Construction  
17 Products Division. The first page of Exhibit 10 is a demonstrative exhibit created by our office  
18 to highlight some of the quotations found within the memo.

19 Exhibit 11 is a true and correct copy of information obtained from the U.S. Census  
20 Bureau internet site (<http://www.census.gov>) entitled "Expenditures for Residential  
21 Improvements and Repairs by Property Type, Quarterly 1962-1998."

22 Exhibit 12 is a true and correct copy of information obtained from the U.S. Census  
23 Bureau internet site (<http://www.census.gov>) entitled "Expenditures to Owner-Occupied  
24 Properties by Type of Job: 1993 to 1998" and "Expenditures to Rental Properties by Type of Job:  
25 1993 to 1998."

26  
AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

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1 Exhibit 13 is a true and correct copy of information obtained from the U.S. Census Bureau  
2 internet site (<http://www.census.gov>) entitled "Expenditures for Improvements and Repairs of  
3 Residential Properties Second Quarter 1999" with attached Tables showing Expenditures for  
4 Maintenance and Repairs and Improvement for 1988 to 1999.

5 Exhibit 14 (Common Exhibit 17) is a report dated August 8-9, 1956 by the Montana State  
6 Board of Health on the Zonolite operation at Libby, Montana.

7 Exhibit 15 (Common Exhibit 26) is a July 20, 1959 report from Libby physician J.M.  
8 Cairns to the manager of the Libby mine documenting 48 abnormal chest x-rays out of 130  
9 people examined.

10 Exhibit 16 (Common Exhibit 33) is a letter dated June 14, 1961 from Earl Lovick,  
11 manager of the Zonolite mill in Libby, Montana to C.A. Pratt, Vice President of Western Mineral  
12 Products Company documenting Grace's knowledge of the large amount of asbestos dust  
13 generated by vermiculite mined at Libby.

14 Exhibit 17 is a true and correct copy of a 10/6/64 Chicago Daily News article entitled  
15 "Suspect Asbestos a Cancer Source."

16 Exhibit 18 (Common Exhibit 53) is a report with a cover letter dated May 11, 1964 of the  
17 Montana State Board of Health regarding the asbestos problem arising out of Libby's handling of  
18 vermiculite.

19 Exhibit 19 (Common Exhibit 130.4) is a study performed by Grace documenting  
20 incidence of lung disease among Libby workers from 17% of the one to five year service group,  
21 "climbing to 92% in the 21 to 25 year service group." Attached to this Grace document is a color  
22 demonstrative exhibit graphing the data from the exhibit summary.

23 Exhibit 20 (Common Exhibits 119.3 and 122.5) consists of March 1969 memos from  
24 Charles Dugan and Peter Kostic of Grace's Industrial Hygiene Department copied to high-level  
25 Grace executives including Rodney Vining, President of the Construction Products Division and  
26

AFFIDAVIT OF ATTORNEY RICHARD S. LEWIS

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1 R.W. Sterrett, Vice President of the Zonolite operations. Attached is a color demonstrative  
2 exhibit.

3 Exhibit 21 (Common Exhibit 182.142) is a March 11, 1976 memo to H.A. Brown,  
4 Executive Vice President of the Zonolite Operations, and copied to Henry Eschenbach, Grace's  
5 chief industrial hygienist; Rodney Vining, President of the Construction Products Division; J.W.  
6 Wolter, Zonolite's vice president in charge of mining and manufacturing; and O.M. Favorito,  
7 General Counsel for W.R. Grace, Industrial Chemicals Group. This exhibit documents Grace's  
8 knowledge of the excessive fiber levels generated by use of Zonolite attic fill. Attached is a  
9 color demonstrative exhibit.

10 Exhibit 22 is a true and correct copy of pages from the 10/23/91 deposition of Robert  
11 Junker together with a demonstrative exhibit created therefrom.

12 Exhibit 23 is a true and correct copy of a 11/1/85 Grace memo regarding lung cancer risk  
13 assessment (30,000 people).

14 Exhibit 24 is a true and correct copy of "Asbestos in Vermiculite Insulation," US EPA  
15 Office of Pollution Prevention and Toxics (December 29, 2000).

16 Exhibit 25 is a true and correct copy of the Affidavit of Henry A. Anderson, M.D., (July  
17 20, 2000).

18 Exhibit 26 is a true and correct copy of "Guidance for Controlling Asbestos-Containing  
19 Materials in Buildings," U.S. EPA (1985) (known as the "Purple Book").

20 Exhibit 27 is a true and correct copy of "Managing Asbestos in Place," U.S. EPA (1990)  
21 (known as the "Green Book").

22 Exhibit 28 is a true and correct copy of the Affidavit of Donald J. Hurst, President of  
23 Fulcrum Environmental Consulting (July 19, 2000).

24 Exhibit 29 is a true and correct copy of an October 9, 2000 Region 1 EPA web page,  
25 "Q&A Regarding Vermiculite Insulation."  
26

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1 Exhibit 30 is a true and correct copy of a September 2000 Region 10 EPA Fact Sheet,  
2 "Asbestos in Attic Insulation."

3 Exhibit 31 is a true and correct copy of a June 28, 2000 ATSDR web page, "Questions  
4 and Answers, Exposure to Asbestos in Insulation."

5 Exhibit 32 is a true and correct copy of the Affidavit of Richard Hatfield (July 18, 2000).  
6 Mr. Hatfield is a certified environmental consultant and the Senior Asbestos Consultant at  
7 Materials Analytical Services.

8 Exhibit 33 is a true and correct copy of EPA Report to Congress of *Asbestos-Containing*  
9 *Materials in Public Buildings*, February 1988, p. 5.

10 Exhibit 34 is a true and correct copy of OSHA Fed. Reg., Vol. 59, No. 153, August 10,  
11 1994, at p. 40978.

12 Exhibit 34.1 is EPA, Asbestos-Containing Materials in Schools, Final Rule and Notice,  
13 52 Fed. Reg. 41826 (Oct. 30, 1987).

14 Exhibit 35 (Common Exhibit 183.183) is a July 11, 1976 report of testing of asbestos  
15 generation by simulated tests installing Zonolite attic fill conducted out of Grace's expanding  
16 plant near Weedsport, New York, which report was copied to Grace's chief industrial hygienist,  
17 Henry Eschenbach; Grace Executive Vice President for Zonolite, E.S. Wood; and Grace's  
18 President in charge of Construction Products Division, Rodney M. Vining. Attached to Exhibit  
19 35 is a color demonstrative exhibit.

20 Exhibit 36 is a true and correct copy of a 4/1/80 letter to Ray from Wood regarding  
21 testing and protocols.

22 Exhibit 37 is a true and correct copy of a 3/25/80 memo to McCord from Eaton regarding  
23 Consumer Products.

24 Exhibit 38 is a true and correct copy of NIOSH Pamphlet No. 81-103, *Workplace*  
25 *Exposure to Asbestos* (November 1980), p. 3.

1 Exhibit 39 is a true and correct copy of EPA Orange Book, Asbestos-Containing Material  
2 in School Buildings: A Guidance Document (March 1979), Part I, p. 1.

3 Exhibit 40 is a true and correct copy of the EPA, *Friable Asbestos-Containing Materials*  
4 *in Schools; Proposed Identification and Notification*, 45 Fed. Reg. 182, p. 61969 dated 9/17/80.

5 Exhibit 41 is a true and correct copy of EPA Blue Book, *Guidance for Controlling*  
6 *Friable Asbestos-Containing Materials in Buildings* (March 1983), p. 1-1.

7 Exhibit 42 is a true and correct copy of *EPA Airborne Asbestos Health Assessment*  
8 *Update* (June 1986), p. 72.

9 Exhibit 43 (Common Exhibit 10c) is an early Zonolite brochure documenting the public  
10 representations concerning the safety of Zonolite attic insulation. Attached is color  
11 demonstrative including a photograph of the front of a bag of Zonolite attic insulation.

12 Exhibit 44 (Common Exhibit 31.6 and 11) are advertisements used to market Zonolite  
13 vermiculite insulation in November of 1960, and a Zonolite brochure used beginning 1950 to  
14 describe how to use Zonolite attic insulation. Attached to Exhibit 44 is a demonstrative exhibit.

15 Exhibit 45 is a true and correct copy of the Affidavit of homeowner John Holbrook (July  
16 21, 2000).

17 Exhibit 46 is a true and correct copy of the Affidavit of homeowner Randy Hatch (July  
18 20, 2000).

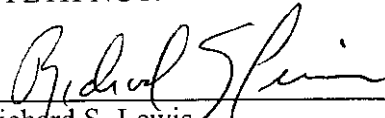
19 Exhibit 47 is a true and correct copy of the Affidavit of homeowner Ralph Busch (July  
20 20, 2000).

21 Exhibit 48 is a true and correct copy of the Affidavit of homeowner Brendan King (July  
22 19, 2000).

23 Exhibit 49 is a true and correct copy of Washington State Survey Summary Report  
24 (October 2000).

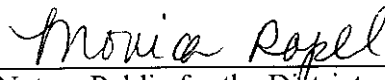
1 Exhibit 50 is an excerpt (pages 2-6) of an EPA Action Memorandum (May 23, 2000)  
2 which was attached as Attachment 1 to EPA Unilateral Administrative Order for Removal  
3 Response Activities (May 24, 2000).  
4

5 FURTHER THE AFFIANT SAYETH NOT.

6   
7 Richard S. Lewis

8 SUBSCRIBED AND SWORN to before me this 19 day of January, 2001.  
9

10  
11 (SEAL)

12   
13 Notary Public for the District of Columbia  
14 My Commission expires: 5/31/2001  
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**EXHIBIT 1**

RECEIVED

DEC 22 2000

JOSEF CASARIE ATTORNEY &amp; COUNSEL

ORIGINAL FILED

DEC 19 2000

SUPERIOR COURT  
SPOKANE COUNTY, WA

## SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARCO BARBANTI, individually and on  
behalf of a class of all others similarly situated,

Plaintiff,

v.

W.R. GRACE & COMPANY-CONN (a  
Connecticut corporation); W.R. GRACE &  
COMPANY (a Delaware corporation); W.R.  
GRACE & CO., a/k/a GRACE, an association of  
business entities; SEALED AIR  
CORPORATION (a Delaware corporation); and  
WILLIAM V. CULVER, resident of the State of  
Washington,

Defendants.

NO. 00-2-01756-6

CLASS ACTIONORDER GRANTING PLAINTIFF'S  
MOTION FOR CLASS CERTIFICATION  
PURSUANT TO CR 23(b)(2)Motion No. 1PLAINTIFF'S  
EXHIBIT1  
MDL 13761. BASIS

THIS MATTER came before the Court for hearing on the 21st day of September, 2000, on Plaintiffs' Motion for Class Certification. All parties were represented by counsel.

In deciding the Motion, the Court considered the oral argument of counsel together with the documents identified in the attached Memorandum Decision.

2. FINDINGS

This Court issued its written Memorandum Decision on this matter on November 28, 2000, and the Court hereby adopts its findings and ruling issued on that date. The Memorandum ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION PURSUANT TO CR 23(b)(2): 1 (Motion No. 1)

10WS-CLIENT 0WSUBSRYWA ZONOUT11 INSULATION/LEADINGSYTH1116 CLASSCERT DOC 13177771

LAW OFFICES  
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A PROFESSIONAL SERVICE CORPORATION  
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111 W SPRAGUE AVE  
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LCH&amp;P

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1 Decision is attached to this Order and fully incorporated herein by reference. In particular, the  
 2 Court expressly finds:

- 3 1). That the numerosity requirement has been met based on the evidence presented;
- 4 2). That named plaintiff's claims present questions of law and fact common to the class;
- 5 3). That the claims of the above-named plaintiff are typical of the claims of the class he  
 6 seeks to represent;
- 7 4). That named plaintiff and his counsel can fairly and adequately represent the interests of  
 8 the class; and
- 9 5). That the action brought by plaintiff is equitable in character and is properly certified  
 10 under Civil Rule 23(b)(2).

### 11 3. ORDER

12 THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion is Granted and that this  
 13 action may be maintained as a class action pursuant to CR 23 and its subdivision CR 23(b)(2) with  
 14 respect to the claims asserted in the Class Action Complaint against W. R. Grace & Company-  
 15 Conn., W. R. Grace & Company, W. R. Grace & Co., a/k/a Grace, an association of business  
 16 entities, Sealed Air Corporation, and William V. Culver. (The Court has not made a finding as to  
 17 the existence or non-existence of the entity sued as "W.R. Grace & Co a/k/a Grace, an association  
 18 of business entities").

19 The Class shall be composed of and defined as: All owners or occupiers of real property  
 20 located in the state of Washington in which Zonolite Attic Insulation has been installed.

21 DONE IN OPEN COURT this 19<sup>th</sup> day of December, 2000.

22 KATHLEEN M. O'CONNOR

23 KATHLEEN M. O'CONNOR  
 24 JUDGE

25 ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS  
 26 CERTIFICATION PURSUANT TO CR 23(b)(2): 2  
 (Motion No. 1)

10/5/01 CLIENT DATA 180110 WA ZONOLITE INSULATION/PLADINGS ORDER CLASS CERT DOC 12/1/01

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1 Presented by:  
2 LUKINS & ANNIS, P.S.

3  
4 By:   
5 DARRELL W. SCOTT, WSBA #20241  
6 Attorneys for Plaintiff

7 Approved as to Form and Notice  
8 Of Presentment Waived:

9 PERKINS, COIE, LLP

10 By: Approved telephonically by V.L. Woolston 12/19/00  
11 V. L. Woolston, Jr., WSBA #9453  
12 Rocco N. Treppiedi, WSBA #9137  
13 Attorneys for Defendants Grace

14 PAINE, HAMBLIN, COFFIN, BROOKE & MILLER

15  
16 By: Approved telephonically by David Broom 12/19/00  
17 Donald G. Stone, WSBA #7547  
18 David L. Broom, WSBA #02096  
19 Attorneys for Defendants Sealed Air Corporation

20  
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25  
26 ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS  
CERTIFICATION PURSUANT TO CR 23(b)(2): 3  
(Motion No. 1)

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**EXHIBIT 2**

1 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

3 MARCO BARBANTI, ETAL,

4 Plaintiff,

5 vs.

6 W. R. GRACE & CO. ETAL,

7 Defendant

) Case No.: No. 00-2-01756-6

) MEMORANDUM DECISION (MOTION #1)

9 This matter came before the court for oral argument on September 21, 2000, on  
10 Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2). The following pleadings were  
11 considered by the court:

- 12 1. Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2)
- 13 2. Brief in Support of Class Certification
- 14 3. Declaration of Kristy L. Bergland
- 15 4. Declaration of Richard S. Lewis
- 16 5. Declaration of Allan M. McGarvey
- 17 6. Affidavit of Darrell W. Scott
- 18 7. Declaration of Fabrice Vincent
- 19 8. Declaration of Edward J. Westbrook
- 20 9. Plaintiffs' Supplemental Submission in Support of Class Certification
- 21 10. Declaration of Fabrice N. Vincent and attachments thereto
- 22 11. Grace Defendants' Brief in Opposition to Plaintiffs' Motion for Class Certification Pursuant  
23 to CR 23(b)(2) and 23(b)(3)
- 24 12. Declaration of Rocco N. Treppiedi and attachments thereto

25 MEMORANDUM DECISION (MOT. #1): 1



- 1 13. Affidavit of Donald J. Hurst (submitted by Plaintiffs in support of the application for  
2 Preliminary Injunction and submitted by Defendants' in support of their opposition to  
3 Plaintiff's Class Certification motion) and attachments thereto  
4 14. Defendant Sealed Air Corporation's Joinder in Grace's Argument and Brief in Opposition to  
5 Plaintiffs' Motion for Class Certification Pursuant to CR 23(b)(2) and 23(b)(3)  
6 15. Plaintiffs' Reply in Support of Motion for Class Certification.  
7

### 8 STATEMENT OF FACTS

9 Plaintiff Barbanti brings this action on behalf of a purported class of all owners and  
10 occupiers of real property located in the State of Washington in which Zonolite Attic Insulation  
11 has been installed. Defendants' are alleged to be the manufacturers of this product. The claims  
12 asserted include product liability claims under the Washington Products Liability Act (WPLA),  
13 RCW 7.72 and violations of the Consumer Protection Act (CPA), RCW 19.86.

14 Plaintiffs' are seeking injunctive relief as well as compensation for property damage  
15 suffered by class members. Plaintiffs are not seeking compensatory damages for any illness a  
16 class member may have contracted as a result of exposure to Zonolite Attic Insulation nor are  
17 they seeking to establish a medical-monitoring regime.  
18

### 19 DISCUSSION

20 In Washington the process of class certification is governed Civil Rule CR 23. At the  
21 outset the plaintiffs must demonstrate that they meet the four requirements of CR 23(a):

22 One or more members of a class may sue or be sued as representative  
23 parties on behalf of all only if (1) the class is so numerous that joinder  
24 of all members is impractical; (2) there are questions of law or fact  
25 common to the class; (3) the claims or defenses of the representative

MEMORANDUM DECISION (MOT. #1): 2

1 parties are typical of the claims or defenses of the class, and (4) the  
2 representative parties will fairly and adequately protect the interests  
3 of the class.

4 Subsection one is known as "numerosity". The only evidence presented with respect to  
5 this section was plaintiffs' reference to a 1985 EPA publication which estimated Zonolite was  
6 installed in 900,000 homes between 1974 and 1984. From that number plaintiffs' estimate at  
7 least 18,800 Washington homes may contain this insulation. Plaintiffs' argue this is a  
8 conservative number as this product was on the market for many years. The defendants' did not  
9 challenge this number. The numerosity requirement has been met.

10 Subsection two is known as "commonality" and requires evidence questions of law or  
11 fact common to the class. Plaintiffs' focus on a common course of conduct by the defendants  
12 towards all potential class members i.e., a pattern of alleged misrepresentations in advertising the  
13 product, failure to warn, etc. as meeting this requirement.

14 Also, plaintiffs' seek equitable relief for the class as a whole in the areas of warnings,  
15 education, and remediation, not individual relief. Plaintiffs' do acknowledge in their  
16 supplemental brief that there may be some potential class members who are already aware of the  
17 alleged problems with Zonolite Attic Insulation and have expended money to remove the  
18 insulation. The injunctive relief suggested by the plaintiffs would include a defendant-funded  
19 remediation program where, presumably, class members would apply for funds to remove the  
20 insulation.

21 However, plaintiffs assert the fact there may be some compensation for remediation does  
22 not detract from the nexus of common facts particularly with respect to the liability issues, I  
23 agree. The issue of monetary damages is more properly considered in connection with the  
24 analysis of whether CR 23(b)(1) or (2) or CR 23(b)(3) applies, not to commonality. The  
25 commonality requirement has been met.

MEMORANDUM DECISION (MOT. #1): 3



1 Subsection three is "typicality". Does the plaintiff's complaint arise from the same  
2 conduct on the part of the defendant that other putative class members may have experienced? It  
3 does. Are there any unique defenses applicable to the plaintiff which would unduly prolong  
4 prosecution of the case from the perspective of putative class members? There does not appear  
5 to be. A number of cases have been cited which stand for the proposition that "... challenging  
6 the same unlawful conduct that affects both the named plaintiff and the rest of the putative class  
7 usually satisfies the typicality requirement, despite disparities in individual factual scenarios."  
8 *Cullen v. Whitman Med. Corp.*, 188 F.R.D.226, 230 (E.D. Pa. 1999). The typicality requirement  
9 has been met.

10 Subsection four is the adequacy of representation and refers to both the class counsel and  
11 the class representative(s). Class counsel are very experienced in class action litigation and  
12 defendants have not taken issue with plaintiffs' counsels' ability to provide adequate legal  
13 representation. Rather the focus is whether Mr. Barbanti, as class representative, can adequately  
14 represent the class.

15 Defendants' assert Mr. Barbanti is an inadequate class representative because: (1) he has  
16 a conflict of interest with putative class members because he alleged only limited statutory  
17 claims; (2) he does not have a claim under the CPA; (3) he is engaging in "claim splitting"; (4)  
18 he lacks standing to request injunctive relief because he knew Zonolite contained asbestos before  
19 he began the lawsuit; and (5) he lacks credibility.

20 Plaintiff responds that a class representative is not required to assert every possible claim  
21 and some claims are not suitable for a class action resolution. This is particularly true of  
22 personal injury claims. In a class action, the concept of "claim splitting" is less of a concern than  
23 it would be in an individual action. It can be more efficient to manage some issues in a class  
24 action setting, i.e. liability issues, and this will not preclude individual litigation of other claims,  
25 i.e. personal injury claims.

MEMORANDUM DECISION (MOT. #1): 4

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1 With respect to the "standing" argument, this court is not aware of any Washington  
2 jurisdictional authority which would prohibit the court from granting plaintiffs' requested relief  
3 of a warning to the public simply because Mr. Barbanti knew Zonolite may have contained  
4 asbestos.

5 The issue of Mr. Barbanti's credibility was raised in connection with his personal  
6 response to the discovery of Zonolite Attic Insulation in some of his properties and his alleged  
7 failure to inspect all of his properties or timely warn his tenants. This fact issue has yet to be  
8 adjudicated by the court and, if true, has not precluded the plaintiffs from pressing for the  
9 hearing of the Motion for Preliminary Injunction.

10 The adequacy of representation has been met.

11 After finding the initial four requirements of CR 23(a) have been met, the court next turns  
12 to the applicability of CR 23(b)(1) or (2) and/or CR 23(b)(3). Plaintiffs' assert as they are  
13 primarily requesting injunctive relief, CR 23(b)(2) is appropriate. Defendants' allege that the  
14 primary purpose of this litigation is monetary, i.e. to compensate persons who remove Zonolite  
15 Attic Insulation.

16 Plaintiffs' complaint indicates it is seeking injunctive relief and other equitable remedies  
17 including a notification program, development of safety procedures and remediation techniques.  
18 In it's Supplemental Submission plaintiffs' characterize as "incidental" requests for damages  
19 some class members may make for expenses already incurred to remove Zonolite. It also  
20 acknowledges that there may be damage claims if they are successful in obtaining equitable  
21 relief.

22 The question is what is the primary purpose of the litigation. This court accepts the  
23 plaintiffs' assertion that equitable relief is the primary purpose although monetary damage claims  
24 would not be unexpected if plaintiffs prevail. The purpose of class action litigation is to allow  
25 individuals, who have common causes of action, to pool their resources and pursue legal relief

MEMORANDUM DECISION (MOT. #1): 5

1 which would otherwise be unavailable due to the cost of litigation and the individual amount of  
2 damages involved.

3 It is also a benefit to both plaintiffs and defendants that putative class members litigate  
4 the class issues in one proceeding to avoid inconsistent adjudications. Defendants have raised  
5 the concern that legal actions involving Zonolite are relatively new and there is no "track record"  
6 of court decisions as a reason for finding class certification is premature. That position flies  
7 squarely in the face of CR 23(b)(1)(A) which recognizes that in cases affecting substantial  
8 numbers of persons, defendants should not be subjected to inconsistent standards of conduct  
9 imposed by multiple court decisions.

10 Finally, defendants rightly point out that asbestos is heavily regulated by federal agencies  
11 and Zonolite is under review by the EPA. Arguably, the resources of a federal regulatory agency  
12 are greater than a state superior court and this court has considered that fact. However, federal  
13 regulation does not preclude class litigation or preempt the court's ability to take jurisdiction.

14 Therefore, the plaintiff Motion for Class Certification under CR 26(b)(2) is granted. Ms.  
15 Scott, please prepare the appropriate order, secure lead counsels' signatures and/or note the order  
16 for presentment.

17 Dated this 28<sup>th</sup> day of November, 2000.

18  
19   
20 KATHLEEN M. O'CONNOR  
21 SUPERIOR COURT JUDGE  
22  
23  
24  
25

MEMORANDUM DECISION (MOT. #1): 6

**EXHIBIT 3**

12/21/00 THU 11:50 FAX 509 747 2323

LUKINS &amp; ANNIS

2 cos

## 1 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE DEC 20 2000

2  
3 MARCO BARBANTI, ET AL,

4 Plaintiff,

5 vs.

6 W. R. GRACE &amp; CO., ET AL,

7 Defendant  
8  
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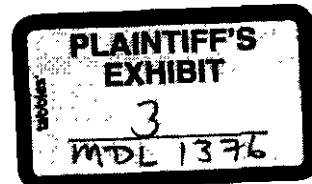
) Case No.: 00-2-01756-6

) MEMORANDUM OPINION  
) MOTION NO. 2 - PLAINTIFF'S MOTION  
) FOR PRELIMINARY INJUNCTION AND  
) EMERGENCY NOTICE TO CLASS  
) MEMBERS

10 Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members  
 11 came before the court for hearing on November 28, 2000. In addition to the pleadings filed in  
 12 this matter, the court has considered the testimony of Donald Hurst; videos from Richard  
 13 Hatfield and Brendon King; the testimony of Ralph Busch, Don Morgan, Todd Hilsec, William  
 14 Huson, M.D., Dr. Richard J. Lee and Dr. Morton Korn and 73 substantive and 19 illustrative  
 15 exhibits. The exhibits include affidavits/declarations and/or deposition excerpts from Henry A.  
 16 Anderson, M.D., Rand Hatch, Brendon King, Rosemarie Thurman, Ernie Matthews, and Bruce  
 17 Hunter.

18 Just prior to commencement of the hearing, counsel received a copy of the court's  
 19 Memorandum Decision certifying a class action under CR 23(b)(2). During opening statements  
 20 counsel for the plaintiff indicated he would focus primarily on the second part of his original  
 21 motion, which was filed on June 1, 2000, the necessity of an emergency notice to class members  
 22 under CR 23(d)(2). After both sides concluded their opening statements, but prior to the  
 23 testimonial phase of the hearing, I indicated to counsel that it was likely I would require a notice  
 24 to class members; however, I would hold plaintiff to the standards of Civil Rule CR 65 in  
 25 determining the contents of that notice.

MEMORANDUM DECISION (MOT. #2) - 1





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1 that right, and (3) that the acts complained of are either  
2 resulting in or will result in actual and substantial injury to  
him or her.

3 King v. Riveland, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994)

4  
5 Has the plaintiff demonstrated there is a statewide hazard, such that court should issue an  
6 emergency notice warning citizens of actual and substantial injury that could occur, before a trial  
7 on the merits has been conducted? At this time I do not believe the plaintiff has demonstrated an  
8 "emergency" which would justify the court sanctioning a notice, and in effect, prejudice the case.  
9 There are factual disputes about the quantity of asbestos in vermiculite; whether or not there is  
10 any threshold level of exposure, which would not be dangerous; the quantity of asbestos fibers  
11 found in the air of the homes tested and the testing protocols used. These are just the type of  
12 disputes meant to be resolved by a trial, not a two-day hearing. Therefore, the notice cannot  
13 imply that the court has ruled on the merits of the plaintiff's claims.

14 However, I am also mindful of the ability of the notice to provide information to citizens  
15 about governmental efforts to address issues raised in this litigation. As long as the notice is  
16 neutral, references to other sources of information about this product may be included as well.

17 Therefore, the notice to class members should include the following:

- 18
- 19 • Identify the subject-matter of the litigation
  - 20 • Identify the court, participants in the litigation and lead counsel
  - 21 • Identify the criteria for members of the class
  - 22 • Identify the implications to the class of certification under CR23(b)(2)
  - 23 • Identify how potential class members should contact plaintiffs' counsel
  - 24 • Identify how potential class members can find out information about the  
litigation, i.e. website, newsletter, correspondence etc.
  - 25 • Identify how potential class members can access other information about the  
issues in this case, i.e. EPA website, State of Washington Department of  
Health websites, etc.

26 There are two suggested notices as exhibits in this case. Neither one is neutral and would  
not be acceptable to the court. Each party may submit a suggested notice form to the court.

MEMORANDUM DECISION (MOT. #2) - 3

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1 Briefly, the issue of primary jurisdiction has been argued in this case. At this time I do  
2 not believe my ruling with respect to the request for preliminary injunction and emergency notice  
3 requires that I address the issue. Whether that remains my position depends upon the course of  
4 the litigation.

5 Mr. Scott, please prepare the appropriate order. I have set this matter for presentment on  
6 January 19, 2001. A separate hearing should be set to approve the notice form. Please consult  
7 my judicial assistant with respect to that hearing.

8  
9  
10 Dated this 19<sup>th</sup> day of December, 2000.

11 KATHLEEN M. O'CONNOR  
12 SUPERIOR COURT JUDGE

13 Kathleen M. O'Connor  
14 Superior Court Judge  
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MEMORANDUM DECISION (MOT. #2) - 4



**EXHIBIT 4**

MARCO BARBANTI, individually and on behalf of a class of all others similarly situated,

NO. 00-2-01756-6

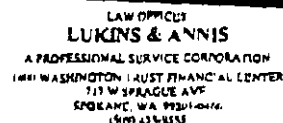
### CLASS ACTION

ORDER DENYING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION AND EMERGENCY  
NOTICE TO CLASS MEMBERS

**Motion No. 2**

THIS MATTER came before the Court for hearing on the 28<sup>th</sup> day of November, 2000, on Plaintiffs' Motion for Preliminary Injunction and Emergency Notice to Class Members Pursuant to Rule 65(a) or Alternatively 23(d)(2). All parties were represented by counsel.

ORDER DENYING PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION: 1  
(Motion No. 2)



1	<b>Pleading</b>	<b>Filed</b>
2	1. Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members Pursuant to Rule 65(a) or Alternatively 23(d)(2) Memorandum Of Authorities	06/01/00
3	2. Memorandum of Points and Authorities in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members Pursuant to Rule 65(a) or Alternatively 23(d)(2)	06/01/00
4	3. Affidavit of Henry A. Anderson, M.D. in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
5	4. Affidavit of Ralph Busch in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
6	5. Affidavit of Rand Hatch in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
7	6. Affidavit of Richard Hatfield in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
8	7. Affidavit of Todd B. Hilsee in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
9	8. Affidavit of Donald J. Hurst in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
10	9. Affidavit of Brendan King in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
11	10. Declaration of Darrell W. Scott in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
12	11. Declaration of Kristy L. Bergland in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
13	12. Declaration of Allan McGarvey in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/01/00
14	13. Declaration Of Rosemarie Thurman in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/14/00
15	14. Declaration Of Ernie Matthews in Support of Plaintiff's Application for Preliminary Injunction and Emergency Notice to Class Members	06/14/00
16	15. Grace Defendants' Preliminary Witness List Regarding Plaintiffs Motion For Preliminary Injunction	09/18/00
17	16. Grace Defendants' Memorandum In Opposition To Plaintiff's Motion for Preliminary Injunction (Motion No 2)	10/6/00

ORDER DENYING PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION: 2  
(Motion No. 2)

LAW OFFICES  
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USDC AND DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SPOKANE, WASHINGTON  
CASE NO. 01-01139-AMC  
FILED 12/17/01  
BY: [Signature]

- 1 17. Declaration Of Rocco Treppiedi Re Defendants' Response To Plaintiff's 10/6/00  
2 Motion For Preliminary Injunction (Motion No 2)
- 3 18. Sealed Air Corp's Joinder In Grace Defendants' Arguments and Brief 10/6/00  
4 Regarding Opposition To Plaintiffs Motion For Preliminary Injunction  
5 (Motion No 2)
- 6 19. Errata To Declaration Of Rocco Treppiedi Regarding Defendants' 10/12/00  
7 Response To Plaintiff's Motion For Preliminary Injunction (Motion No 2)
- 8 20. Plaintiff's Reply To Defendants' Opposition to Plaintiffs Motion for 10/20/00  
9 Preliminary Injunction and Emergency Notice to Class Members Pursuant  
10 to CR 65(a) or Alternatively to CR 23(d)(2) (Motion No 2)
- 11 21. Declaration Of Robert Parks In Support Of Plaintiff's Application For 10/20/00  
12 Preliminary Injunction And Emergency Notice To Class Members (*filed as*  
13 *Exhibit to Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion*  
14 *for Preliminary Injunction*)
- 15 22. Supplemental Declaration of Todd B. Hilsee 10/20/00
- 16 23. Affidavit of Darrell W. Scott in Support of Plaintiff's Reply To 10/20/00  
17 Defendants' Opposition to Plaintiffs Motion for Preliminary Injunction and  
18 Emergency Notice to Class Members Pursuant to CR 65(a) or  
19 Alternatively to CR 23(d)(2) (Motion No 2)
- 20 24. Affidavit Of William E Longo Phd (Motion No 2) 11/17/00
- 21 25. Affidavit Of John M Dement (Motion No 2) 11/17/00
- 22 26. Affidavit Of John Prebil 11/21/00
- 23 27. Affidavit Of Paul Price 11/21/00

19 The court additionally considered the testimony of Donald Hurst, video from Richard Hatfield,  
20 video from Brenden King, testimony of Ralph Busch, testimony of Don Morgan, testimony of  
21 Todd Hilsee, testimony of William Hughson, MD, testimony of Dr. Richard Lee and testimony of  
22 Dr. Morton Corn and the exhibits referenced in the attached Memorandum Opinion.  
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ORDER DENYING PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION: 3  
(Motion No. 2)

SPokane (1) 101120WS CLIENT DOWELL BRYAN WA FORD LITIG INSULATION PLEADING SGRUUP PRELIMINARY INJUNCTION.DOC (12/29/01)

LAW OFFICES  
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## 2. FINDINGS

This Court issued its written Memorandum Decision on this matter on December 20, 2000, and the Court hereby adopts its findings and ruling issued on that date. The Memorandum Opinion is attached to this Order and fully incorporated herein by reference. In particular, the Court expressly finds that factual disputes exist that are meant to be resolved by a trial and the plaintiff has not demonstrated an "emergency" pursuant to CR 65 that would justify the court issuing a notice that would, in effect, prejudice the case or imply that the court has ruled on the merits of the plaintiff's claims. The Court, however, finds that a neutral notice to class members under CR 23(d)(2) is appropriate and that such notice should include the following:

- Identify the subject-matter of the litigation;
- Identify the court, participants in the litigation and lead counsel;
- Identify the criteria for members of the class;
- Identify the implications to the class of certification under CR 23(b)(2);
- Identify how potential class members should contact plaintiffs' counsel;
- Identify how potential class members can find out information about the litigation, i.e. website, newsletter, correspondence, etc.; and
- Identify how potential class members can access other information about the issues in this case, i.e. EPA website, State of Washington Department of Health websites, etc.

A separate hearing should be set to approve the notice form.

## 3. ORDER

THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction and Emergency Notice to Class Members is denied. A notice to class members is

ORDER DENYING PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION: 4  
(Motion No. 2)

SPokane Involuntary Client DW541881WA 2000LITE INSULATION PLEADING BOARD PRELIMINARY INJUNCTION DOC 3/29/00

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1 appropriate at this time, however, and each party may submit a suggested notice form that complies  
2 with this Court's instructions, for consideration at a separate hearing to be set by the Court.

3 DONE IN OPEN COURT this \_\_\_\_ day of \_\_\_\_\_, 20001.  
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5  
6

7 KATHLEEN M O'CONNOR  
8 JUDGE

9 Presented by:  
10 LUKINS & ANNIS, P.S.  
11

12 By: \_\_\_\_\_  
13 DARRELL W. SCOTT, WSBA# 20241  
14 Attorneys for Plaintiff  
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ORDER DENYING PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION: 5  
(Motion No. 2)

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**EXHIBIT 5**